

ARKANSAS SUPREME COURT

No. CR 06-149

NOT DESIGNATED FOR PUBLICATION

Opinion Delivered June 22, 2006

ANDREW NEELY, JR.
Appellant

v.

STATE OF ARKANSAS
Appellee

PRO SE MOTIONS FOR EXTENSION
OF TIME TO FILE APPELLANT'S
BRIEF [CIRCUIT COURT OF
PULASKI COUNTY, CR 97-1293, HON.
JOHN LANGSTON, JUDGE]

APPEAL DISMISSED; MOTIONS
MOOT

PER CURIAM

In 1997, appellant Andrew Neely, Jr., was found guilty of residential burglary and rape and sentenced to 480 months' imprisonment and fined \$15,000. The Arkansas Court of Appeals affirmed. *Neely v. State*, CACR 97-1486 (Ark. App. June 17, 1998). Subsequently, appellant timely filed in the trial court a *pro se* petition for postconviction relief pursuant to Ark. R. Crim. P. 37.1, which the trial court denied. We affirmed the order. *Neely v. State*, CR 99-386 (Ark. September 28, 2000) (*per curiam*).

In 2005, appellant filed in the trial court a *pro se* petition for writ of *habeas corpus* pursuant to Act 1780 of 2001, codified at Ark. Code Ann. §§16-112-201--207 (Supp. 2003). Therein, appellant maintained that his identity was at issue in the trial court inasmuch as he entered a plea of not guilty to the charges and no physical evidence connected appellant with the crimes against the victim. Furthermore, appellant argued that his confession was presented at the jury trial without corroborating evidence and that he did not confess to the crimes during the trial. As a result,

appellant claimed that there was insufficient evidence, physical and otherwise, to convict him of the crimes, and that the victim's testimony could not support his conviction. Appellant requested that DNA and fingerprint testing be conducted on the evidence gathered at the crime scene. Appellant contended that the test results would prove that he did not have sexual contact with the victim and that it would have been a "physical impossibility" for the crime to have been committed as recounted by the victim. The trial court denied the petition without a hearing, and appellant, proceeding *pro se*, has lodged an appeal here from that order.

Now before us are appellant's *pro se* motions for extension of time to file appellant's brief. We need not consider these motions as it is apparent that appellant could not prevail in this appeal if it were permitted to go forward because he failed to demonstrate a legitimate basis for the writ. Accordingly, we dismiss the appeal and hold the motions moot. This court has consistently held that an appeal from an order that denied a petition for postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *See Pardue v. State*, 338 Ark. 606, 999 S.W.2d 198 (1999) (*per curiam*); *Seaton v. State*, 324 Ark. 236, 920 S.W.2d 13 (1996) (*per curiam*).

Act 1780 of 2001 provides that a writ of *habeas corpus* can issue based upon new scientific evidence proving a person actually innocent of the offense or offenses for which he or she was convicted. *See* Ark. Code Ann. § 16-112-103(a)(1) (Supp. 2003) and sections 16-112-201--207¹; *see also Echols v. State*, 350 Ark. 42, 84 S.W.3d 424 (2002) (*per curiam*). There are a number of predicate requirements that must be met under Act 1780 before a circuit court can order that testing be done. *See* sections 16-112-201 to -203. Of significant importance in the instant matter, the Act

¹Appellant filed his petition prior to the enactment of Act 2250 of 2005 with an effective date of August 12, 2005, that amended portions of the relevant statute.

requires a *prima facie* showing of identity as an issue at trial when a petitioner contends that he is entitled to posttrial scientific testing on the ground of actual innocence. Section 16-112-202(b)(1); *Graham v. State*, 358 Ark. 296, ___ S.W.3d ___ (2004) (*per curiam*).

Appellant alleged in his petition that merely entering a plea of “not guilty” to the charges sufficiently raised the issue of identity throughout the entire matter, including the jury trial. On direct appeal, appellant raised no issues regarding identity, but instead argued that the State did not sufficiently prove the element of forcible compulsion to sustain his conviction of rape. We noted therein that appellant’s confession, introduced at trial, included a statement that appellant and the victim had consensual sex the night of the crime. In his Rule 37.1 petition, appellant claimed that trial counsel was ineffective for failing to challenge the suggestibility of a pretrial, photographic identification. Further, appellant claimed for the first time that the trial court erred in denying his motion to suppress a statement he made to the police. However, we declined to address the latter issue as appellant failed to raise it in his direct appeal.

We find that appellant failed to make a *prima facie* showing that identity was an issue at trial by virtue of the evidence adduced at trial establishing identity. *Orndorff v. State*, 355 Ark. 261, 132 S.W.3d 722 (2003) (*per curiam*). In light of appellant's failure to place his identity at issue before the trial court, there is no basis to find that the trial court erred when it denied his petition for scientific testing.

Appeal dismissed; motions moot.